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April 21, 2008

Frank Melbourn
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4353

Re: 501 Dewatering: Administrative Civil Liability Penalties

Dear Mr. Melbourn:

I appreciated your phone call last week. As we discussed, we continue to seek an extension to the hearing date for Complaint No. R9-2008-0019 for Administrative Civil Liability for Mandatory Minimum Penalties Under Water Code Section 13385 issued for 501 First Street, Coronado ("Complaint"). As my prior letter explained, we believe the Complaint's allegations raise complicated issued of fact and law cannot properly be assessed under the current schedule. When we spoke, we also discussed two additional points. First, that you planned to revise the Complaint because it calculated six month *averages* rather than six month *medians.* Second, I suggested that even at this early stage, we believe strong arguments favor a drastic reduction if not elimination of all the penalties alleged under the Complaint.

While we continue to assess the Complaint's allegations, I feel prepared to elaborate on at least two points that I raised when we spoke. First, that the Complaint over-calculates the fine by improperly assessing 8 separate six month median penalties. Second, that the dewatering did not discharge pollutants or waste in violation of the Clean Water Act or the California Water Code and, thus, no penalties can be justified under the law.

<u>The Complaint Incorrectly Sets Fines for 6-Month Medians</u>

Order No. 2000-90 ("Order 2000-90"), which authorizes groundwater discharges to San Diego Bay, establishes copper effluent limitations for a *six month median* value of 3.1 parts per billion. *Order2000-90* at pp. 12-13. According to the Order, "[t]he 6-month median effluent concentration limit shall apply as a moving median of daily values for *any 180-day period* ..." *Order 2000-90* at p. 22. This provision's terms expressly require the median to cover a 180-day period. Thus, it allows only one possible interpretation, that the 6-month median penalties only trigger after 180 days of discharge has occurred. Indeed, the State Water Resources Control Board defined the six month period as the 180 days immediately following the first

violation.* While it may be true that after 180 days, the limit may "roll" or "move" as a 180 day window, the window cannot begin rolling until at least 180 days has accrued.

Contrary to the Order's language, the Complaint alleges 8 separate six month median penalties (totaling $24,000) for a time period that spanned less than 180 days. The Complaint alleges that the first copper violation occurred on August 9, 2006, and that the last occurred on February 6, 2007 - less than 180 days later. Because the alleged violation did not occur for 180 days, no 6-month median penalties may be issued.

I believe the Complaint incorrectly applied the "rolling" six month period discussed in *City of Brentwood v. Central Valley Water Quality Control Board.* 123 Cal.App.4th *714 (2004).* That case does not even apply here because it addressed the question of whether 4 or more non-serous violations occurred during a six month period pursuant to § 13385(i). *Id.* at 727. It did not address six month median calculations for serious violations, that the Complaint alleges pursuant to § 13385(h). While *City of Brentwood* upheld a "rolling" six month approach, nothing in that opinion would start the rolling before 180 days. Thus, even if it could be applied here, it does not authorize the issuance of 6-month median penalties before 180 days of violations even occurred.

De-Watering Did Not Contain Pollutants Nor Did It Qualify As A Waste Discharge

While it seems clear that the RWQCB cannot assess six months median penalties, we also believe that neither the California Water Code nor the Clean Water Act provide legal justification for any of the penalties alleged.

Under the Order, "[t]he *addition of pollutants* to extracted groundwater to be discharged to San Diego Bay is prohibited." *Order 2000-90* at p. 11. The Order restates this prohibition as follows: "[t]he discharge of groundwater extraction *wastes*... containing *pollutants* in excess of ... effluent limitations is prohibited." *Order 2000-90* at p. 12. Indeed, the Order's language comports with the mandatory minimum penalty provisions of Cal. Water Code § 13385, which set penalties for *waste* discharges in excess of *pollutant* limits. § 13385(h)(2). Finally, the Order's language also comports with the Clean Water Act (which § 13385 implements, see *City of Brentwood v. Central Valley Regional Water Quality Control Board*, 123 Cal. App. 4th 714, 723 (2004)), and which prohibits the discharge of pollutants which the Act defines as "any addition of a pollutant..." 33 U.S.C. §§ 1311(a), 1326(12).

The Order's language, as well as that provided in the California Water Code and the Clean Water Act clearly provide that mandatory minimum penalties only trigger upon the "addition of pollutants" and the discharge of "waste." Thus, these necessary elements of the offence are prima facie elements, not affirmative defenses. As elements

* STATE WATER RESOURCES CONTROL BOARD, SB 709 AND SB 2165 QUESTIONS AND ANSWERS p 13 (Apr. 17, 2001).

of the alleged offence, we believe, the RWQCB bears the burden of proof. The current administrative record makes no such showing, nor do we believe that one can be made.

Federal courts have held that an addition of pollutant does not occur when water is simply re-circulated without introducing a pollutant "from the outside world" *National Wildlife Federation v. Gorsuch*, 693 F. 2d 156, 165 (D.C. Cir. 1982). Notwithstanding this rule, some courts have held that the discharge of unaltered waters qualified as the addition of a pollutant, but they have only done so in cases where the discharge altered the water quality of the receiving water and where the discharge occurred between distinct waters. *See e.g. Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, 325 F. 3d 1155, 1159 (9th Cir. 2003) (discharge from distinct water altered quality of receiving water); *Catskill Mountains Chapter of Trout Unlimited Inc. v. City of New York,* 273 F.3d 481, 493 (movement of one discrete water to another). Even the United States Supreme Court has held that only the movement between meaningfully distinct waters triggers the Clean Water Act. *Miscogee Tribe v. S.Fla. Water Mgmt Dist.*, 541 U.S. 95, 112 (2004). As the Court famously quoted, "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id.* at 110 (citations omitted).

Here, the dewatering process simply withdrew water from the San Diego Bay, or at most from the non-distinct and hydraulically connected water below the neighboring ground, and re-circulated it back to the Bay without adding or altering its copper content. The dewatering operation did not, we believe, involve distinct waters. Nor did it add a pollutant from the outside world or adversely impact the receiving water – the San Diego Bay. Because the treatment system did not add copper, the presence of copper in the effluent can only be attributed to the presence in the Bay in the first instance. Thus, the dewatering process did not discharge pollutants in violation of the Clean Water Act.

Order 2000-90 as well as Cal. Water Code § 13385 implement the Clean Water Act. Thus, the lack of any pollutant discharge is enough to make the alleged penalties improper. For the same and similar reasons as those for discharge of pollutant, the 501 dewatering operation cannot qualify as a discharge of "waste" under the California Water Code. Among other things, the discharge does not cause pollution. It simply re-circulates the Bay's water.

In addition to the two points described in this letter, we also believe that the 501 dewatering successfully qualifies for the affirmative defenses set forth in Cal. Water Code § 13385, and that with adequate time to develop information for the record, we will show that at least one of these defenses applies here. We do not believe that the de-watering effort added copper and, thus, copper could only have come from discharged made by a 3rd party into the Bay or because of a natural phenomenon.

Thanks again for your call last week. I truly believe that the best and most fair resolution will occur with an extended hearing date. As this letter suggests, I also believe that the Complaint's allegations do not stand on firm ground. Thus, I would welcome and appreciate the opportunity to meet with you to discuss settlement and resolution of these issues.

Sincerely,

OPPER & VARCO LLP

J. Michael Sowinski Jr.

/jms
cc: Michael P. McCann, San Diego Regional Water Quality Control Board